Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLE

No. 80-333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TOWN OF SOUTHAMPTON,

Appellant,

against

RONALD J. TROYER, DANIEL STEIN,
and LINDA CHRISTENSEN,

Appellees.

JURISDICTIONAL STATEMENT

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Questions Presented

1. Whether a local legislature's regulation of solicitation by a "content blind" ordinance which denies a trespasser under common law an unlimited right to speak on a homeowner's private property should be sustained as a protection of the right to privacy.

2. Whether under 42 U.S.C. §§1983, 1988 attorney's fees should be awarded for a municipality's purely legisative acts.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

TOWN OF SOUTHAMPTON,

Appellant,

against

RONALD J. TROYER, DANIEL STEIN,
and LINDA CHRISTENSEN,

Appellees.

JURISDICTIONAL STATEMENT

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit herein affirming the District Court has not been published. The opinion of the District Court is published *sub nom. Troyer* v. *Town of Babylon,* 483 F. Supp. 1135 (1980).

Grounds of Jurisdiction of the Supreme Court

i. This is a proceeding to set aside an ordinance regulating solicitation on private property brought pursuant to 28 U.S.C. §§1331, 1343(3), (4), 2201, 2202 and 42 U.S.C. §1983.

ii. The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed here was dated April 24, 1980, and entered the same day. The notice of appeal was filed July 18, 1980 in the Second Circuit.

iii. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

iv. *City of New Orleans* v. *Duke*, 427 U.S. 297 (1976), sustains the jurisdiction of this Court.

v. The full text of the ordinance at issue, No. 43, is as follows:

> Solicitors on Private Property
>
> No person shall enter upon any private residential property in the Town of Southampton, Suffolk County, New York, for the purpose of vending, peddling, or soliciting orders for any merchandise, device, book, periodical or printed matter whatsoever; nor for the purpose of soliciting alms, or a subscription or a contribution to any church, charitable or public institution whatsoever; nor for the purpose of distributing any handbill, pamphlet, tract, notice or advertising matter, nor for the purpose of selling or distributing any ticket or chance whatsoever, without the consent of the occupant of said premises previously given.
>
> Nothing herein contained shall be construed to apply to any person who has been a bona fide resident of the Town of Southampton, New York, for a period of at least six (6) consecutive months last past, nor to any person who has maintained a place of business in the Town of Southampton for a period of at least six (6) consecutive months, prior thereto, or his duly authorized representative. Any person violating this Ordinance shall be subject to a penalty of not more than One Hundred ($100.00) Dollars for each violation thereof.
>
> Any violation of this Ordinance shall constitute disorderly conduct, and the person violating the same shall be a disorderly person.

It may be found in the *Code, Town of Southampton*, ch. 65.

Statement of the Case

This case was brought to set aside local ordinance 43 of the Town of Southampton, an anti-solicitation ordinance. Initially suit was commenced against appellant and three other towns of the County of Suffolk, Babylon, Huntington and Riverhead. In a companion case, appellees sought similar relief against several Nassau County municipalities. The challenged ordinances were not all the same, most involving licensing requirements. Except for Southhampton the other cases were disposed of prior to trial.

Appellees are members of the Holy Spirit Association for the Unification of World Christianity, the Unification Church, but have brought this suit in their own names. It is a duty of each member of the Unification Church to solicit funds for the organization which is done in the streets and other places where people congregate and door to door. Although this solicitation is done simultaneously with evangelization, the District Court said

> ". . . some of its public activities have been said to have a higher content of the secular—e.g., selling flowers, candy and other objects for cash—than is usual in most organized religions today."

Appellees Stein and Christensen, and their group leader Timothy Castille, were planning a several state fund raising campaign from a church facility in Hempstead, Long Island. They called upon appellee Troyer to assist them. Mr. Troyer is the church's field coordinator for legal affairs. His sole function is to help negotiate permits for fund raising throughout the country.

Pursuant to Castille and appellees Stein and Christensen's request, appellee Troyer telephoned various municipalities on Long Island including the Town of Southampton for fund raising permits. After some initial confusion appellees were informed that while they could solicit in public places in the Town without any permits whatsoever, unconsented door-to-door solicitation was proscribed.

The Town of Southampton was settled in 1640 by settlers from Massachusetts seeking greater physical privacy. From the very beginning the homestead was an intensely private place. Officials were hired to police the law of trespass, and new settlers were not accepted until they had resided in the Town for a period of six months. At the same time the colonists treasured and practiced the right of dissent. When ". . . they had anything to say, they had a forum or they had a meeting house . . ." Today there still is a Meeting House Lane in the Village of Southampton.

The insistence of Southampton residents on their dual rights to privacy and speech has remained constant for over three hundred years. Fifty percent of the members of one local church are descendants of the original settlers, and many new residents move into Town each year. The new residents come for the physical privacy. Children are brought up never to go to someone's home without notifying that person ahead of time. Adults expect the same courtesy in return. One senior citizen characterized anything less as an invasion of her privacy.

The Town is essentially rural, and although many homes are closer there are two acres of land per inhabitant. Signs posted on one's own property would be considered repulsive intrusions; and signs posted on another's property in a residential area would carry what should be talked about elsewhere to the privacy of the homestead. In any event signs are ineffective in warding off trespassers.

The free exchange of ideas is as vibrant now as it was in 1640. In shopping centers, and parks, at municipal buildings, and meeting houses, around coffee shops and on beaches, people in Southampton exchange ideas. The residents are particularly susceptible to religious messages at such gatherings.

As the Town of Southampton grew, and its homes became less spread out, it needed a new trespass ordinance which would protect the right of privacy in the home. Ordinance 43, which the District Court said was passed in good faith for this purpose,

does no more than codify what was the common law of trespass in the Town, that individuals are not permitted on private property for other than the personal and family use thereof, and shall enter only on notice and with the owner's consent. Consent could either be express or implied but no short term resident would ever have implied permission to enter another's property.

As was the custom the ordinance places no restriction on solicitation in public areas. In short ordinance 43, which prohibits only uninvited solicitations on residential property, reflects the residents' cherished rights of privacy and private property and of free speech.

What Southampton residents cherish, however, conflicts with the logistics and demographics of door-to-door solicitation. Even though appellees admit their public solicitation is very successful, and that they obtain actual permission to visit homes "very, very much," they brought this suit to strike down Southampton's local ordinance 43. Appellees prevailing below were awarded attorney's fees pursuant to 42 U.S.C. §§1983, 1988.

THE QUESTIONS ARE SUBSTANTIAL

Introduction

Appellant submits this case presents substantial questions for plenary review because the courts below wrongfully tried to accommodate the competing constitutional claims of the solicitor's right to free speech and homeowner privacy by striking down a "content blind" residential solicitation ordinance. This Court in *Lloyd Corporation* v. *Tanner,* 407 U.S. 551 (1972) indicated it would sustain private property rights over free speech where as here the speaker is a trespasser invading the homeowner's privacy. At least homeowner privacy is of the highest constitutional order and it should not be destroyed to preserve another constitutional right. *See Carey* v. *Brown,* — U.S. —, 48 L.W. 4756, 4760 (No. 79-703, June 20, 1980). Yet citing *Martin* v. *City of Struthers,* 319 U.S. 141 (1943), appellees have prevailed

in the courts below. They are members of a church some of whose public activities the District Court said "have a higher content of the secular" but who have a mission to preach to the world. Appellant Town of Southampton, on the other hand, was settled in 1640 by individuals who sought to protect, the Town historian testified, the "privacy of their possessions and privacy of their personal beliefs." Accordingly, because the courts below treated the sharply defined constitutional claims herein at variance with prior decisions of this Court by placing the right of free speech over the right of homeowner privacy, this case should be accepted for full review.

ARGUMENT

I. The Courts below should not have accorded Appellees, trespassers at common law, first amendment rights paramount to homeowner privacy.

A. Under principles already enunciated by this Court would-be trespassers have no first amendment rights on someone else's homestead.

The first question raised by this appeal is whether a municipality has the power in a "content blind" ordinance to keep trespassing solicitors off residential property when those solicitors claim non-commercial first amendment rights. Appellant submits this Court answered that question in *Hynes* v. *Mayor and Council of Borough of Oradell*, 425 U.S. 610 (1976):

> There is, of course, no absolute right under the Federal Constitution to enter on the private premises of another and knock on a door for any purpose, and the police power permits reasonable regulation for public safety. We cannot say . . . that door to door canvassing and solicitation are immune from regulation under the State's police power, whether the purpose of the regulation is to protect from danger or to protect the peaceful enjoyment of the home.

425 U.S. at 619. Nevertheless, the courts below, citing *Martin* v. *City of Struthers,* 319 U.S. 141 (1943), ruled appellant could not constitutionally enact an ordinance which prohibited uninvited, and thus trespassing, solicitors from entering onto private residential property, because such an ordinance on balance restricts solicitors' first amendment rights.

Martin v. *Struthers,* as explained by *Breard* v. *City of Alexandria,* 341 U.S. 622 (1951), seems to stand for the proposition that a municipality may not make trespassers out of those seeking to distribute non-commercial literature to homeowners if the homeowners would permit such solicitors on their property. Citing the general rule that a knocker on the front door invites solicitors onto property, 341 U.S. at 646, the Court in *Breard* presumed the solicitors were legitimately on the property to begin with.

In *Lloyd Corporation* v. *Tanner,* 407 U.S. 551 (1972), the Court stated the converse rule: if the solicitor was not legitimately on private property, i.e. if without the challenged ordinance, he would still be a trespasser at common law, then as a trespasser he has no first amendment rights and may be precluded from the premises. 407 U.S. at 564-566. The Court said:

> Although accommodations between . . . [free speech and private property] are sometimes necessary, and the courts properly have shown a special solicitude for the guarantees of the First Amendment, this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only.

407 U.S. at 567-568.

At oral argument the Second Circuit panel here questioned whether the *Lloyd* v. *Tanner* rule would apply in a case where a State or one of its subdivisions was a party. This Court answered that question too in *Hynes* v. *Mayor of Oradell, supra,* when it said the State could regulate the sometimes conflicting

rights of speech, on one hand, and of privacy and property, on the other, that accrue to private parties. 425 U.S. at 619. This case at bar is similar to *Lloyd* v. *Tanner* in that the challenged ordinance adjusts the same personal constitutional rights at issue there, and does not itself restrict constitutional freedoms in favor of a governmental function. *Compare Village of Schaumburg* v. *Citizens for a Better Environment*, —— U.S. ——, 63 L. Ed. 2d 73 (1980).

Under the rule of *Lloyd* v. *Tanner* there is no question that even leaving aside the challenged ordinance plaintiffs-appellees as solicitors would be trespassers at common law. It is axiomatic that at common law no one may enter on the property of another without the latter's consent. See e.g. *Pierce* v. *Hosmer*, 66 Barb. 345. Although *Breard* v. *Alexandria, supra*, cites the general rule that a knocker gives implied permission that people come and use it, the authorities show that the permission is implied not from the knocker itself but from the customs and habits of the local community. *See McKee* v. *Gratz*, 260 U.S. 127, 136 (1922); *see generally* W. Prosser, The Law of Torts §18, p. 102 [4th ed. 1971], Restatement of Torts, Second §892 Comment (d), pp. 363-364.

The conclusive unrefuted proof at trial was that in the Town of Southampton a knocker does not constitute by custom and habit an invitation to enter private property, and that the homestead is and has always been an intensely personal place. One who is not known is not invited to a home, and no one who visits a home would propagandize a message better left to meeting halls and market places. Since colonial times, by the customs and habits of the community, those residing in the appellant municipality less than six months do not have implied permission to enter others' property, and are considered trespassers when they do unless they have express consent.

Therefore, unless this Court in *Breard*, was fashioning a constitutional rule, in derogation of the common law and as an accommodation to free speech, that knockers or doorbells in every case invite non-commercial solicitors onto private residential

property (which would make no-solicitor signs a constitutional prerequisite to the right to privacy) appellees are trespassers in the appellant municipality, and under *Lloyd* v. *Tanner* they may not assert first amendment rights as a bar to prosecution.

It is obvious the courts below thought *Martin* v. *Struthers* and *Breard* v. *Alexandria* fashioned a constitutional preference for non-commercial free speech of trespassers over private property rights of homeowners in door-to-door solicitation cases. This means, however, they disregarded the statement of this Court made in *Lloyd* v. *Tanner, supra,* thirty years after *Martin* and twenty years after *Breard* that it had ". . . never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned . . ." 407 U.S. at 568; and again in *Hynes* v. *Mayor of Oradell, supra,* that "There is, of course, no absolute right under the Federal Constitution to enter onto the private premises of another and knock on the door for any purpose . . ." 425 U.S. at 619.

The challenged ordinance, on the other hand, is consistent with *Lloyd* v. *Tanner.* It excludes from its terms those who by custom and habit would have implied permission to enter onto private residential property, i.e., those who because they have resided or conducted business locally for six months are known in the area. Yet the courts below, citing *Shapiro* v. *Thompson,* 394 U.S. 618 (1969), said that appellant could not use residency to distinguish between trespassers and invitees.

This Court has said that residency may be used to distinguish among persons: "Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens . . . equally." *Baldwin* v. *Montana Fish and Game Comm'n,* 436 U.S. 371, 383 (1978). Certainly what constitutes a common law trespass in a given locality does not bear upon the vitality of the Nation, the District Court trying to fix an area-wide rule of trespass to facilitate national fundraising nothwithstanding. In the words of this Court ". . . the problem must be worked out by each community for itself" . . . *Martin* v. *Struthers,* 319 U.S. at 148-149.

The reference to six months living or doing business in the area is not a legislative artifice arbitrarily distinguishing between two groups of citizens to deny one group some governmental benefit. Rather it is a definition founded in the common law—the District Court noted it existed in colonial times and was adopted here in good faith—which rationally outlines, based on custom, history and the like, those who have implied permission to enter private residential property. Since to protect the strong governmental interest in homeowner privacy legislatures may even distinguish between kinds of speech, *Erznozik* v. *City of Jacksonville*, 422 U.S. 205, 209 (1975), appellant municipality should be able to codify the common law of trespass in its local area for the same purpose. *See Hynes* v. *Mayor of Oradell, supra*, 425 U.S. at 619.

Accordingly, the instant ordinance should have been upheld as a protection of homeowner privacy and property rights over appellees' first amendment claims as trespassers.

B. Even if solicitors have first amendment rights vis-a-vis homeowner privacy, it is unfair to balance those rights so the speech is preserved and privacy destroyed.

This Court said just last term that:

> Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value. Our decisions reflect no lack of solicitude for the right of an individual "to be let alone" in the privacy of the home, "sometimes the last citadel of the tired, weary, and the sick" . . . [citations omitted] The State interest in protecting the well-being, tranquility, and the privacy of the home is certainly of the highest order in a free and civilized society.

Carey v. *Brown*, — U.S. —, —, 48 L.W. 4756, 4760 (No. 79-703, (June 20, 1980). If the privacy of the home is of the

highest order in a civilized society, then the courts below erred when on balance they gave a preference to first amendment rights, for in doing so here, they vitiated the homeowner's right to privacy.

Citing *Martin* v. *Struthers, supra, Lamont* v. *Postmaster General,* 381, U.S. 301 (1965), and *Rowan* v. *United States Post Office Department,* 397 U.S. 728 (1970), the courts below tried to balance speech and privacy rights, including the rights of non-party homeowners who might prefer receiving messages from unknown, unannounced solicitors over maintaining personal privacy. They decided to place on the homeowner who wanted his or her privacy the burden of posting signs to that effect. First of all, this approach misunderstands the challenged ordinance which, unlike the one of the City of Struthers, leaves to the homeowner the choice whether to accept solicitors or not. *Compare* Local Ordinance 43, *supra,* at p. 2, *with Martin* v. *Struthers, supra,* 319 U.S. at 142, 148.

Furthermore, without the instant content-blind ordinance, there is no way to keep trespassing solicitors off private property in the appellant municipality. Suing such individuals for civil damages would cost more money than may be gained. Further, the proof was that *no-solicitor signs are totally ineffective in keeping solicitors off private property,* besides being repugnant invasions of the privacy sought to be protected. Thus the courts below vitiated one constitutional right, privacy, in favor of another. This is no balance at all.

Even if that were not the case, why should one who seeks to preserve a right of the highest order like privacy in the home be burdened to a greater degree than one who seeks to protect an equally preferred right like free speech. It is specially noteworthy that the appellant municipality was settled in 1640 by those who cherished both rights, privacy and speech, and the challenged ordinance has its foundations in the accommodations between rights made then. The courts below seemed to think *Lamont* and *Rowan* v. *U.S. Post Office, supra,* read together found a constitutional preference for speech over privacy, but

this Court refused to make such a finding in *Martin* v. *Struthers, supra,* (which *Rowan* limited) and in the later case *Lloyd* v. *Tanner, supra,* despite suggestions by concurring and dissenting Justices that it do so. *See Martin* v. *Struthers, supra,* 319 U.S. at 149 [Murphy, J. concurring]; *cf. Lloyd* v. *Tanner, supra,* 407 U.S. at 580-581 [Brennan, J. dissenting].

This case is of course a stronger case for a right to privacy than *Carey* v. *Brown, supra,* where solicitors were kept off the streets in a residential neighborhood, than *Lloyd* v. *Tanner,* where solicitation was prohibited in a shopping center, and than *Rowan* v. *U.S. Post Office, supra,* and *Lamont* v. *Postmaster General, supra,* where speech through the mails was restricted. Here the physical invasion of the home is at issue, while at the same time solicitors in the appellant municipality are free to use the streets, shopping centers and the mail for proselytizing. More than that, solicitors may solicit at the home with the permission of the homeowner. Since there is such opportunity for free speech under the challenged ordinance, the courts below erred in striking a balance which annihilated the intense personal privacy at issue here. *Lloyd* v. *Tanner, supra,* 407 U.S. at 566-567.

Therefore, assuming solicitors have free speech rights on someone else's property, their rights should not be so immune to regulation that they destroy the right of a homeowner to his or her privacy.

II. Attorney's fees should not be awarded for purely legislative acts under 42 U. S. C. §§1983, 1988.

Last term this Court found in a suit where attorney's fees were sought, pursuant to 42 U.S.C. §1988, that the Supreme Court of Virginia was not liable for attorney's fees when its challenged activities were legislative in nature. *Supreme Court of Virginia* v. *Consumers Union of the United States,* — U.S. —, —, 64 L. Ed. 2d 641, 657 (1980). The other issue presented

on this appeal is whether appellant municipality should be liable for attorney's fees for its legislative act, if this Court decides the challenged ordinance was unconstitutional.

In the *Supreme Court of Virginia* v. *Consumers Union* case, the immunity of the public body to attorney's fees under 42 U. S. C. §1988 flowed from its absolute immunity as a quasi state legislative body under 42 U. S. C. §1983. Since under New York Law municipal corporations also act as State legislative bodies, under the rationale of *Supreme Court of Virginia* v. *Consumers Union*, appellant should be immune from paying attorney's fees in this case. N.Y. Municipal Home Rule Law §10 (a)(12) (McKinney's Supp. 1979-1980).

If this Court does not wish to extend the legislative immunity doctrine, still appellant municipality should not pay for attorney's fees herein since this was not a case properly brought under 42 U. S. C. §1983. *See Baker* v. *McCollan*, 443 U.S. 137, 61 L. Ed. 2d 443 (1979). Appellees were not subjected to the deprivation of a right to which Congress has given the highest priority. Appellees were left hundreds of places where they could proselytize including, with permission, the home. Appellees suffered no harm. They were not arrested under the challenged ordinance. Moreover, appellees' rights were balanced against another right of the highest order, homeowner privacy. *Cf. Carey* v. *Brown, supra*, 48 L. W. at 4760. Appellant, for its part, it was noted, acted in good faith adopting an ordinance specifically upheld as valid by the highest court of the State of New York. *See People* v. *Bohnke*, 287 N.Y. 154 (1941), *cert. denied* 316 U.S. 667 (1942).

If appellant's balancing of different constitutional rights was incorrect under 28 U. S. C. §§1331, 1343, that does not turn the instant ordinance into a constitutional tort under 42 U. S. C. §1983. *See Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 615-620, 60 L. Ed. 2d 508, 521-524 (1979).

Attorney's fees should not have been awarded.

CONCLUSION

The questions presented herein are substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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APPENDIX

Notice of Appeal to the Supreme Court of the United States

UNITED STATES COURT OF APPEALS
for the SECOND CIRCUIT

RONALD J. TROYER, DANIEL STEIN, and LINDA CHRISTENSEN,
Appellees,

against

TOWN OF SOUTHAMPTON,
Appellant.

Civil Action No. 80-7094

Filed July 18, 1980

Notice is hereby given the Town of Southampton, appellant herein, hereby appeals to the Supreme Court of the United States.

(1) the final order entered in this action on April 24, 1980; and

(2) the order awarding counsel fees on appeal entered herein July 7, 1980.

This appeal is taken pursuant to Title 28, United States Code, section 1254.

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Decision-Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS
for the SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of Bridgeport, Connecticut on the 24th day of April, one thousand nine hundred and eighty.

Present:

HON. STERRY R. WATERMAN
HON. WILLIAM H. TIMBERS
HON. JON O. NEWMAN

Circuit Judges.

RONALD J. TROYER, DANIEL STEIN,
and LINDA CHRISTENSEN,
Plaintiffs-Appellees,

v. Docket No. 80-7094

TOWN OF SOUTHAMPTON,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is *affirmed* substantially

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for the reasons set forth in Judge Weinstein's opinion dated December 28, 1979.

Appellees are individual members of the Holy Spirit Association for the Unification of World Christianity. They commenced this action challenging the constitutionality of Ordinance 43 of the Town of Southampton. The ordinance prohibits door-to-door solicitation without the prior consent of the occupant. Residents of Southampton for six months or more are exempt from the ordinance. After a bench trial the district court declared the ordinance unconstitutional as applied to appellees and enjoined its enforcement against them.

The prior permission requirement of the ordinance constitutes a clear violation of the First Amendment. It is for the householder rather than the Town of Southampton to determine whether a solicitor should be received. *Martin* v. *Struthers,* 319 U.S. 141 (1943). Moreover, the residency exemption unconstitutionally infringes upon the right to travel and the right to equal protection *Shapiro* v. *Thompsen,* 394 U.S. 618 (1969).

See our order of today's date, to the extent relevant, affirming the judgment in *New York Public Interest Research Group* v. *Village of Garden City,* Docket Nos. 79-7680 and 79-7880.

STERRY R. WATERMAN
WILLIAM H. TIMBERS
JON O. NEWMAN
Circuit Judges

Opinion of District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RONALD J. TROYER, DANIEL STEIN, and LINDA CHRISTENSEN,

Plaintiffs,

against

TOWN OF BABYLON, TOWN OF HUNTINGTON, TOWN OF RIVERHEAD, TOWN OF SOUTHAMPTON,

Defendants.

MEMORANDUM AND ORDER
79-C-401

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WEINSTEIN, D.J.

Fifteen years ago defendant, the Town of Southampton, adopted an ordinance designed to (1) reduce solicitors' leaving of printed materials which target empty houses for would-be burglars and create problems of litter; and (2) protect its inhabitants' privacy and its tourist population against victimization by solicitors. Plaintiffs are members and missionaries of the Holy Spirit Association for the Unification of World Christianity. To aid their evangelical activities Church members solicit support both in the streets and other areas where people congregate, and door-to-door, tendering literature, flowers and other merchandise for cash offerings. They seek an order enjoining enforcement of the ordinance and declaring it unconstitutional as applied to them on the grounds that it abridges their exercise of freedom of speech and religion and deprives them of the equal protection of the law.

Southampton has 45,756 inhabitants who occupy 145 square miles, making its density one person per two acres. The population multiplies in the summer months to accommodate vacationers; much of the year many homes are vacant and substantial neighborhoods are virtually unattended.

Founded in 1640, the town is successor to the first English settlement in New York. A group from Lynn, Massachusetts sought good farm land, religious freedom and privacy on the east end of Long Island. *See generally* Robertson, Purcell B., Profiles of the Early Settlers of the Town of Southampton, Long Island (1977); Adams, James Truslow, History of the Town of Southampton (1918); Pelletreau, William S., Old Southampton, The Long Island Magazine, Vol. 1, No. 2, p. 22 (Sept. 1893); Howell, George Rogers, History of Southampton with Genealogies (2d ed. 1887).

Poor roads kept Southampton fairly isolated and the town's people closely knit. "One of the most fundamental aspects [of life in Southampton] was the screening of all prospective new-

comers with the right of acceptance (usually preceded by a trial period of six months) or rejection." Robertson, Purcell B., Profiles of the Early Settlers of the Town of Southampton, Long Island, 9 (1977); I Southampton Town Records, p. 111 (1965). Town approval had to be acquired before a house or property could be sold. Adams, James Truslow, History of the Town of Southampton, 98-99 (1918). In the case of transients, bonds were required from their hosts. *Id* at 98; II Southampton Town Records, p. 181 (1691).

At the trial of this action the townpeople's continuing strong sense of privacy was stressed. Somewhat facetious repeated references during the trial to witnesses who had not been born in the town but had lived there for "only" decades suggested a widespread suspicion of strangers.

I. Ordinance

The Southampton ordinance prohibits door-to-door distribution of religious literature and the solicitation of funds without the prior consent of the occupants, but exempts from its operation any person who has resided or maintained a place of business in the town for at least six months. It reads as follows:

> Ordinance No. 43
>
> Solicitors on Private Property
>
> No person shall enter upon any private residential property in the Town of Southampton, Suffolk County, New York, for the purpose of vending, peddling, or soliciting orders for any merchandise, device, book, periodical or printed matter whatsoever; nor for the purpose of soliciting alms, or a subscription or a contribution to any church, charitable or public institution whatsoever; nor for the purpose of distributing any handbill, pamphlet, tract, no-

tice or advertising matter, nor for the purpose of selling or distributing any ticket or chance whatsoever, without the consent of the occupant of said premises previously given

Nothing herein contained shall be construed to apply to any person who has been a bona fide resident of the Town of Southampton, New York, for a period of at least six (6) consecutive months last past, nor to any person who has maintained a place of business in the Town of Southampton for a period of at least six (6) consecutive months, prior thereto, or his duly authorized representative. Any person violating this Ordinance shall be subject to a penalty of not more than One Hundred ($100.00) Dollars for each violation thereof.

Any violation of this Ordinance shall constitute disorderly conduct, and the person violating the same shall be a disorderly person.

II. Law

Defendant's concern for its residents' privacy and the protection of their property, privacy and aesthetic enjoyment of the area is entitled to consideration. So, too, are plaintiff's constitutional rights of free speech and religion and the rights of those in the town to receive plaintiffs' information.

The Church is controversial and some of its public activities have been said to have a higher content of the secular—e.g., selling flowers, candy and other objects for cash—than is usual in most organized religions today. *See, e.g.*, F. Sontag, Sun Myung Moon and the Unification Church (1977); I. L. Horowitz, Science, Sin and Scholarship (1978); C. Edwards, Crazy for God, 156-170 (1979); A. Nelson, God, Man and the Rev. Moon, The Nation, p. 325, March 31, 1979; C. Trillin, Bayou La Batre, Alabama, New Yorker, p. 99, March 27, 1978. Yet

there is little doubt that its canvassing activities must be characterized as religious for purposes of the first amendment. There is a "reasonable possibility (1) that the conviction [of plaintiffs] is sincerely held and (2) that [their beliefs are] based upon what can be characterized as theological, rather than secular—e.g., purely social, political or moral views." *Stevens* v. *Berger*, 428 F. Supp. 896, 899 (E.D.N.Y. 1977). *See also, e.g.*, Note, "Mind Control" or Intensity of Faith: The Constitutional Protection of Religious Belief, 13 Harv. Civil Rights-Civil Liberties L. Rev. 751 (1978).

Where there is a conflict between rights, our pragmatic society usually attempts to preserve as much of the interests of all parties as possible. We recognize that the extension of the freedoms of some often has a tendency to encroach upon those claimed by others. Nevertheless, the burdens placed on plaintiffs' free expression of ideas are not easily justified by balancing them against local interests in privacy and property. *See, e.g.*, Tribe, American Constitutional Law §§12-2 et seq. (1978); Frantz, The First Amendment in the Balance, 71 Yale L. J. 1424 (1962). Here the issue is whether the town has drawn a proper constitutional balance by preferring residents' religious proselytizing over that of strangers, and by requiring outsiders to restrict their activities to public business areas or to obtain permission *before* approaching private homes.

A. Burdens Imposed By Town Ordinance

1. Burdens Imposed by Limiting Non-Commercial Solicitation

Enforcement of Ordinance 43, prohibiting all distribution of literature to homes except upon compliance with burdensome conditions, adversely affects plaintiffs' ability to disseminate information that is within the protection of the first amendment. In *Martin* v. *City of Struthers*, 319 U.S. 141, 63 S. Ct. 862 (1943), the Supreme Court balanced the interests of a city

against the limitations imposed upon freedom of speech by a flat prohibition of door-to-door solicitation and found it unconstitutional.

> The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightment was ever to triumph over slothful ignorance.

319 U.S. at 143, 63 S. Ct. at 863. There, as here, the municipality claimed a unique interest in preventing harassment, litter, fraud and burglary. There, as here, the statute was applied to one espousing a religious cause. The Court, despite these claims, found the state's intervention unjustified.

> While door-to-door distributers of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion. The widespread use of this method of communication by many groups espousing various causes attests its major importance . . . Many of our most widely established religious organizations have used this method of disseminating their doctrines. . . . Door-to-door distribution of circulars is essential to the poorly financed causes of little people. . . . The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.

319 U.S. at 145-147, 63 S. Ct. at 864-65. *See also Lovell* v. *Griffin*, 303 U.S. 444, 58 S. Ct. 666 (1938); *Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 623-630, 96 S. Ct. 1755, 1762-1765

(1976) (Brennan, J. concurring). Following *Martin,* courts have invalidated local ordinances in circumstances similar to one at bar. *See Weissman* v. *City of Alamogordo, N.M.,* 472 F. Supp. 425 (D.C. N.M. 1979) (local ordinance prohibited church activities declared invalid); *Love* v. *Mayor, City of Cheyenne, Wyo.,* 448 F. Supp. 128 (D.C. Wyo. 1978) (same).

2. Burdens Imposed by Requiring Invitation to Solicit

The problem not addressed by *Martin* v. *City of Struthers*—to what extent the state, or a subdivision, may adopt regulations concerning the exercise of individual homeowner consent—may be answered by a synthesis of *Lamont* v. *Postmaster General,* 381 U.S. 301, 85 S. Ct. 1493 (1965) and *Rowan* v. *United States Post Office,* 397 U.S. 728, 90 S. Ct. 1484 (1970). In *Lamont,* the Court invalidated a statute which, in effect, required the citizens to indicate a desire to receive "communist propaganda" from abroad. The statute was found unconstitutional because it imposed an affirmative obligation of consent to receive communications.

In *Rowan,* the Court sustained a procedure permitting a citizen to elect not to receive certain mail; it recognized the tradition of permitting individuals to shield themselves, at least at home, from unwanted intrusions. "The Court has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers or peddlers from his property." 397 U.S. at 737, 90 S. Ct. at 1490.

In effect, *Lamont* and *Rowan* read together indicate that in balancing societal and private interests in the free flow of ideas, the right of individual citizens to privacy and the ability of the state to exercise its police power, the Constitution does not allow government to create a rebuttable presumption that people do not wish to be exposed to a particular class of ideas, or mode of expression. To override strong first amendment interests, the individual desiring privacy must assume the burden of indicat-

ing the choice to be let alone. The role left to the states is to facilitate individual choice.

New York follows the *Rowan* approach. Its statutes protect residents from unwanted visitors, unscrupulous business operators, high pressured salespersons and potential burglars; they permit the householders or the consumer to take affirmative action by posting to prevent solicitation and by punishing illegal conduct, rather than by requiring an invitation to solicit. New York Penal Law Sections 140.05 and 140.10 make it a violation to enter onto property when posted signs specifically ask solicitors not to do so. *People* v. *Basch*, 36 N.Y. 2d 154, 158-159, 365 N.Y.S. 2d 836, 840 (1975); *Peopole* v. *Accee*, 15 N.Y. 2d 568, 254 N.Y.S. 2d 833 (1964); App. Div. 1966). *See also* N.Y. Personal Property Law, Art. 10-A Home Solicitation Sales §§425 et seq. (affords consumers, subjected to door-to-door sales a "cooling-off" period); N.Y. General Business Law §396 (prohibits fraudulent sales practices); Executive Law, Art. 7-A (regulates solicitation and collection of funds for charitable purposes). If the Town of Southampton finds it necessary to supplement the State laws with regulations of its own, it must do so in a manner that does not burden the first amendment rights of willing speakers and willing listeners.

3. Burdens Imposed by Equivalent of Licensing Fee

Perhaps a group might by a comprensive telephone campaign arrange for permission before visiting particular homes, but the financial and logistical burdens would inhibit newly organized or minor cults and creeds. Requiring consent of householders before approaching their homes constitutes, in effect, an indirect unconstitutional imposition of a licensing fee; it generates costs which burden the exercise of first amendment rights in direct proportion to the number of persons the speaker wants to reach. *See, e.g., Hynes* v. *Mayor and Council of Borough of Oradell*, 425 U.S. 610, 96 S. Ct. 1755 (1976) (licensing); *Follett* v. *Town of McCormick, S.C.*, 321 U.S. 573, 64 S. Ct. 717 (1944)

(fees). It does not matter whether the impediment to free speech works its evil overtly or covertly. *Grosjean* v. *American Press Co.*, 297 U.S. 233, 56 S. Ct. 444 (1936).

4. Burden Imposed By Discriminating Against Outsiders' Ideas

The second part of the Southampton ordinance exempts from the operation of the first part ". . . any person who has been a bona fide resident of the Town of Southampton, New York, for a period of at least six consecutive months last past, [or] any person who has maintained a place of business in the Town of Southampton for a period of at least six consecutive months . . . or his duly authorized representative."

Although the ordinance appears to be ideologically neutral, in effect it differentiates on the basis of content by precluding those with "foreign" ideas from availing themselves of an historically protected means of communication while opening the same medium to residents' point of view. Thus, as applied, the ordinance distinguishes between permissible solicitation based upon subject matter, i.e., it prevents persons carrying messages that are not already represented in the town from using a forum that is available to residents. Even a nonresident authorized representative of a resident may solicit; only those with uncongenial beliefs would find it difficult to locate a sponsor.

Government has no power to restrict expression or communication because of its content, subject matter or familiarity. *Cohen* v. *California*, 403 U.S. 15, 24, 91 S. Ct. 1780, 1787 (1971). Once the Southampton ordinance is perceived as one which describes permissible door-to-door solicitation in terms of subject matter, it is outlawed by *Police Department of City of Chicago* v. *Mosley*, 408 U.S. 92, 92 S. Ct. 2286 (1972). In *Mosley*, a Chicago ordinance prohibited all picketing within 150 feet of a school, except peaceful picketing of any school involved in a labor dispute. It was held violative of the equal protection

clause of the fourteenth amendment because it made an impermissible distinction based upon content. The Court held:

> . . . under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.
>
> Guided by these principles we have frequently condemned such discrimination among different users of the same medium of expression.

408 U.S. at 96, 92 S. Ct. at 2290.

5. Burdens Imposed by Limiting Freedom of Movement

Even if the town's regulation is not characterized as a content censoring device, it remains subject to strict scrutiny under the equal protection clause because it distinguishes between residents and non-residents:

The fourteenth amendment provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The term person in this context encompasses residents and nonresidents and entitles both to equal protection of a state's laws. *See* Karst, Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1, 4 (1977). An ordinance based upon citizenship, residence or alienage creates a suspect

classification and must be shown to be necessary to further a compelling state interest. *See, e.g., Sugarman* v. *Dougall,* 413 U.S. 634, 93 S. Ct. 2842 (1973); *In Re Griffith,* 413 U.S. 717, 93 S. Ct. 2851 (1973). *Cf.* Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 Colum. L. Rev. 1023, 1060 ff (1979) (doctrine explicable on federalism rather than equal protection grounds as it applies to aliens).

The right to travel freely within this nation to speak, work and enjoy other incidents of life, liberty and property is an aspect of the constitutional right not to be discriminated against because of residence. It is essential to the fundamental concept of a free society operating in a single nation and thus serves as one of the pillars of our constitutional structure. *Cf.* C. Black, Structure and Relationships in Constitutional Law (1969). Laws that prohibit newly arrived persons in a state or county from receiving the same benefits as established residents unconstitutionally burden the right to travel. *See, e.g., Shapiro* v. *Thompson,* 394 U.S. 618, 89 S. Ct. 1322 (1969); *Memorial Hospital* v. *Maricopa County,* 415 U.S. 250, 94 S. Ct. 1076 (1974). In *Memorial Hospital,* the Court noted:

> Not unlike the admonition of the Bible that, "Ye shall have one manner of law, as well for the stranger, as for one of your own country," Leviticus 24:22 (King James Version), the right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents.

415 U.S. at 261, 89 S. Ct. at 1084.

Defendants rely heavily on the fact that New York's highest court, thirty years ago, approved an ordinance discriminating against nonresident solicitors on the ground that "the distinction is valid in a small village where, presumably, the dangers and annoyances of trespasses or unsolicited visits are less when

the trespassers or uninvited visitors are not strangers but known, or easily identifiable and traceable, residents of the community." *People* v. *Bohnke,* 287 N.Y. 154, 159, 38 N.E. 2d 478, 479 (1941), *cert. denied,* 316 U.S. 667, 62 S. Ct. 1034 (1942). But constitutional doctrine has changed and so has the attitude of the New York Court of Appeals. It has recently stricken its six month residence requirement for bar candidates as a violation of the privileges and immunities clause embodied in Article IV of the federal Constitution. *In Re Gordon,* ____ N.Y. ____, ____ N.Y.S. 2d ____ (November 3, 1979). In view of the forthright unanimous decision in *Gordon* and supporting authority, it seems likely that the New York Court of Appeals would have declared the Southampton ordinance invalid as an "invidious discrimination against nonresidents." ____ N.Y. 2d at ____, ____ N.Y.S. 2d at ____. This appears to have been the conclusion of the Supreme Court, which distinguished *Bohnke* on the ground that it "was decided before this Court's decision in Martin v. City of Struthers." *Beard* v. *City of Alexandria, La.,* 341 U.S. 622, 628, n. 6, 71 S. Ct. 920, 925, n. 6 (1951). *People* v. *Bohnke* is no longer binding.

6. Burdens Imposed By Need to Comply with Differing Local Regulations

In addition to portions of New York City, there are in the Eastern District of New York the counties of Nassau and Suffolk, 92 villages, 13 towns and 2 cities, each having power to enact local ordinances. Were each of these municipalities to adopt a separate provision regulating the flow of ideas, organizations such as the Church would be seriously burdened in attempts to solicit and proselytize in this district. Even if each ordinance presented a relatively minor barrier, the necessity of complying with different regulations in each of over 100 separate municipalities would effect a substantial barrier to the free transmittal of views across all of Long Island. The open marketplace of ideas cannot be restricted to little stalls, each separately regulated by local officials.

That this threat to free speech and unencumbered exercise of religion is a real one is reflected in the history of this lawsuit. In its original posture it involved different ordinances of eight other towns and villages located throughout Long Island. The defendants included the Towns of Babylon, Huntington, Riverhead, Hempstead and Oyster Bay and the Villages of Hempstead, Freeport and Rockville Centre. Seven settled with plaintiffs and a judgment was entered, after a trial, declaring Babylon's ordinance unconstitutional as applied to plaintiffs.

B. Lack of Compelling Local Interest

Ordinances imposing restrictions on the ability to exercise fundamental rights are unconstitutional unless the state can demonstrate that they are "necessary to promote a compelling government interest." *Shapiro* v. *Thompson,* 394 U.S. 618, 634, 89 S. Ct. 1322, 1331 (1969). The Town of Southampton has a heavy burden of justification.

During the trial a number of persons testified that the Town's homeowners prefer not to have persons coming to their houses and intruding upon their privacy. The witnesses indicated that, even today, a long time next-door neighbor will not visit except upon specific invitation by telephone or face-to-face arrangement made off the property. The town is also concerned that the posting of numerous signs will have an adverse effect on the aesthetics of this rural community and cause property values to decline because potential purchasers will suspect that something is amiss. Southampton's police chief testified that it takes about six months to recognize new residents and that the ordinance facilitates patrol of the area since any stranger may be stopped and at least warned that door-to-door canvassing is forbidden by a local ordinance.

Such justifications are inadequate.

> It is not sufficient for the State to show that durational residence requirements [and classifications based upon residence or the content of speech] further a very substantial state interest. In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with "precision," *NAACP* v. *Button,* 371 U.S. 415, 438 (1963); *United States* v. *Robel,* 389 U.S. 258, 265 (1967), and must be "tailored" to serve their legitimate objectives. *Shapiro* v. *Thompson, supra,* at 631. And if there are other, reasonable ways to achieve these goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less drastic means." *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960).

Dunn v. *Blumstein,* 405 U.S. 330, 343, 92 S. Ct. 995, 1003 (1971). *See also Talley* v. *California,* 362 U.S. 60, 80 S. Ct. 536 (1960).

If the town's concern is for the privacy of its residents, it may advise each of them that unwanted intrusions may be avoided by the posting of signs that warn off solicitors. Here the dangers of distribution may ". . . easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors." *Martin* v. *City of Struthers,* 319 U.S. 141 147, 63 S. Ct. 862, 865 (1943). *See also, e.g., Hynes* v. *Mayor and Council of Borough of Oradell,* 425 U.S. 610, 96 S. Ct. 1755 (1976); *Frontiero* v. *Richardson,* 411 U.S. 677, 690-91, 93 S. Ct. 1764, 1773 (1973); *Reed* v. *Reed,* 404 U.S. 71, 76, 92 S. Ct. 251, 254 (1971) (economy and administrative convenience cannot justify a statutory classification that is subject to strict judicial scrutiny). Evidence that signs posted by individual owners might reduce property values are entitled to little weight when measured against the burdens on constitutionally protected rights of the plaintiff Church solicitors.

III. Conclusion

The interests of the Town of Southampton in the privacy of its citizens, the reduction of litter and the maintenance of property values are not sufficient to justify the burdens imposed upon plaintiff's constitutional rights by Ordinance 43. It is declared unconstitutional as applied to plaintiffs.

So ordered.

Dated: Brooklyn, New York
December 28, 1979

JACK B. WEINSTEIN
U.S.D.J.

No. 80-333

MICHAEL ROD

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TOWN OF SOUTHAMPTON,

Appellant,

—against—

RONALD J. TROYER, DANIEL STEIN,
and LINDA CHRISTENSEN,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION TO AFFIRM

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Counsels for Appellees

Questions Presented

1. Whether a local ordinance prohibiting door to door solicitation by all except residents of the community for more than six months is valid in a state which provides that property owners may post their respective properties against unwanted solicitors.

2. Whether attorneys' fees are appropriate under 42 U.S.C. 1988 in an action for declaratory judgment and injunctive relief pursuant to 42 U.S.C. 1983.

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—against—

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Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The Questions Are Insubstantial

The Blanket Prohibition Upon Door to Door Solicitation by Nonresidents Has Consistently and Recently Been Held Unconstitutional.

The issue over the constitutionality of a door to door solicitation ordinance has most recently been dealt with by this Court in *Village of Schaumburg* v. *Citizens for a Better Environment,* —— U.S. ——, 63 L. Ed. 73 (1980). This case is indistinguishable with respect to any material fact from *Schaumburg* and from *Martin* v. *City of Struthers,* 319 U.S. 141 (1943).

In the statement of the case in Appellant's jurisdictional statement, there is no mention of the New York state law "trespass" sections of the Penal Law, N.Y. Penal Law §§ 140.05, 140.10 (McKinney 1975), which make it a viola-

tion to enter property which has been posted with signs specifically asking solicitors not to do so. Neither the opinion of the District Court, nor the affirmance by the Second Circuit, nor any position urged at any time by Appellees would deprive a property owner seeking privacy of the right to post her or his property and thus secure all of the benefits of the privacy so dear to the settlers of the Town of Southampton and their descendants. Appellees do not seek to thrust themselves upon unwilling listeners nor to enter upon property which has been barred to such entry by the simple procedure afforded by the New York statute. Similarly, Appellees do wish the opportunity to present their religious message to those householders and residents who do not individually choose to post their property. The rights, not only of the Appellees, but of those non-posting residents would be violated by the position urged by Appellant.

The patent discrimination in the subject ordinance against outsiders creates the suspect class based upon residence condemned by this Court in *Sugarman* v. *Douggal,* 413 U.S. 634 (1973) and *In re Griffith,* 413 U.S. 717 (1973), and inhibits the right of interstate travel, contrary to the principles enunciated by this Court in *Memorial Hospital* v. *Maricopa County,* 415 U.S. 250 (1974) and *Shapiro* v. *Thompson,* 394 U.S. 618 (1969).

Appellees do not denigrate the privacy interests of the residents of Southampton, but the argument that Southampton is, by virtue of its history, somehow entitled to interfere with First Amendment rights to a greater extent than other communities is an argument without precedent, which certainly must be rejected in light of the less drastic alternatives, such as posting, available to those who wish to elevate their personal privacy above the First Amendment rights of others.

The essence of the argument of the Appellant is that Southampton is not only special in New York, and therefore not bound by the State legislative policy imposed in the posting-trespass statutes, but unique in the United States and therefore entitled to elevate the privacy considerations of its residents above the First Amendment rights of those residents and visitors who wish peaceably to assemble, communicate, and proselytize their religious philosophies.

Attorneys Fees Were Appropriately Awarded

Appellees sought and secured declaratory and injunctive relief against the attacked ordinance. It is a novel theory, presented for the first time insofar as Appellees are aware, that an action for declaratory and injunctive relief against unconstitutional legislation is not subject to the award of counsel fees because the predicate enactment of the unconstitutional legislation was, obviously, a legislative act. *Supreme Court of Virginia* v. *Consumers Union of the United States,* —— U.S. ——, 64 L. Ed. 641 (1980), does not stand for such a proposition. As a matter of fact, as this Court said in the last paragraph of the opinion in *Consumers Union,* "Fee awards against enforcement officials are run-of-the-mill occurrences, even though, on occasion, had a state legislature acted or reacted in a different or more timely manner, there would have been no need for a law suit or an injunction." *Consumers Union* differentiates between the enforcement role and the enactment role. Appellant attempts to obscure that distinction.

CONCLUSION

The questions presented are insubstantial, having been addressed and disposed of clearly and explicitly in recent prior determinations by this Court. The judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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—against—

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Appellees.

NOTICE OF APPEARANCE

SIRS:

PLEASE TAKE NOTICE that the undersigned hereby appears herein as counsel for the Appellees.

Dated: New York, New York
October 3, 1980

Yours, etc.,

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